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In The

Supreme Court of the United States

October Term, 1976

No.

76-1190

GEORGE FASSNACHT and JANET FASSNACHT, his wife,

Petitioners,

vs.

ARLEN SPECTER, WILLIAM STEVENS, JOSEPH O'NEILL, ROBERT W. MARTIN, JOHN E. McLAUGHLIN, JOSEPH ZALENSKI, BERNARD LYNCH, MORTON SOLOMON, JOSEPH MORRISSEY, EDWARD RAGIN, HOWARD McGRATH, DENNIS JOINS, WILLIAM BORBRIDGE, RAYMOND GRAHAM, FRANK A. MOYER, MILTON GINN, LARRY PAUL, DENNIS A. CHALUPA, BRYAN BERST, JOSEPH R. HANLIN, GEORGE MAZEL, and other individuals whose identities and whereabouts are unknown at the present time, all individually, jointly and severally, and as employees of the City of Philadelphia, the United States Government and the United States Army,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT**

To: The Honorable, the Chief Justice of the United States,
and the Associate Justices of the United States Supreme
Court:

The petitioners, George Fassnacht and Janet Fassnacht, his wife, respectfully pray that a writ of certiorari issue to review an order of the United States Circuit Court of Appeals for the Third Circuit entered in this proceeding on November 29, 1976.

OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit and the United States District Court for the Eastern District of Pennsylvania appear in the Appendix hereto.

JURISDICTION

The order of affirmance of the Court of Appeals for the Third Circuit was entered on October 8, 1976 and petition for rehearing filed by the appellants, petitioners herein, was denied on November 29, 1976.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is the statute of limitations on the Civil Rights action herein a two year statute of limitations from the suppression of

physical evidence by Judge Murphy of the Municipal Court of Philadelphia on October 27, 1972?

The court answered in the affirmative.

2. Should the statute of limitations on the civil rights action herein be a two year statute of limitations from the suppression of the evidence and denial of the Commonwealth's appeal to the Common Pleas Court from the order of Judge Murphy which was decided by Judge Doty on November 8, 1973?

The court answered in the negative.

3. Irrespective of the above-dated orders, should not the applicable statute of limitations run from the final event necessary to make the claims sueable which could be in this case either:

(a) The six year statute of limitations on wrongful conversion, 12 Purdon's Statutes, Section 31, to date from July 18, 1974 when petitioner was provided with a property receipt for the first time, and said receipt indicated to petitioner that items were missing or stolen?

The court did not reach this question.

(b) The six year statute of limitations from the date that the ongoing coverup and conspiracy eventually ends since the Commonwealth refuses to return Mr. Fassnacht's property because it is aware that items have been stolen, as well as

destroyed due to negligence and a wanton and malicious disregard for petitioner's property?

The court did not consider this question.

(c) The one year statute of limitations on malicious mischief to date from an acquittal of petitioner which occurred in December, 1973?

The court did not consider this question.

(d) The one year statute of limitations on defamation which after further investigation could possibly be up to December, 1974?

The court did not consider this question.

4. Has petitioner stated in his complaint a cause of action under 42 U.S.C. §1986 and properly raised either racial or perhaps otherwise class-based invidiously, discriminatory animus as stated in *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)?

The Circuit Court answered in the negative.

5. Has petitioner stated in his complaint a cause of action based under 42 U.S.C. §§1983, 1985 or 1986 against federal officials acting under color of federal law?

The Circuit Court answered in the negative.

STATEMENT OF THE CASE

On June 20, 1971 an illegal search and seizure was performed at the home of petitioners, George and Janet Fassnacht. As a result of the illegal seizure of physical evidence, petitioner, George Fassnacht, was charged with possession of machine guns and possession of explosives, both violations of the Pennsylvania Penal Code.

Petitioner, George Fassnacht, proceeded to trial before the Honorable Joseph T. Murphy, Judge of the Municipal Court of Philadelphia, on September 23, 1971 and said trial continued through October 4, 1971. The testimony taken during said trial was consolidated for use in the motion of George Fassnacht to suppress the evidence, as well as to be considered by the court on its merits should the court deny the motion to suppress. On October 27, 1971, Judge Murphy filed an order and a 26-page opinion suppressing all evidence arising from the search of petitioners' residence. The Commonwealth immediately filed an appeal in the Superior Court of Pennsylvania, but said appeal was stricken as being improper since the proper court for review is the Court of Common Pleas of Philadelphia County. Said appeal to the Common Pleas Court was filed by the Commonwealth from Judge Murphy's order suppressing all evidence and by a 9-page opinion and attached order thereto dated November 8, 1973. Judge Ethan Allen Doty denied the Commonwealth's appeal on the suppression of all items found in petitioner's residence and ordered that physical evidence seized could not be used at a trial.

Notwithstanding the decision of Judge Doty suppressing all

evidence and denying the Commonwealth's appeal, the Commonwealth proceeded to trial against the petitioner herein, George Fassnacht, and trial was held before Judge Murphy in the Municipal Court of Philadelphia. Mr. Fassnacht was found not guilty on all charges in December of 1973. Petitioner, George Fassnacht, subsequently filed a petition for the return of confiscated property. The Commonwealth opposed said petition and a hearing was held on July 16 and 18, 1974 before the Honorable Ned L. Hirsch, Judge of the Court of Common Pleas of Philadelphia County. During said hearing before Judge Hirsch, petitioner herein, George Fassnacht, was supplied for the first time with a property receipt allegedly setting forth the items taken from his residence on June 20, 1971. On January 6, 1975 by order of Judge Hirsch, the petition for the return of confiscated property was denied and the material was ordered to be destroyed. On June 6, 1975 Judge Hirsch filed a legal opinion. A supersedeas was filed with the Superior Court and subsequent appeal was duly filed. As of this date, briefs and oral argument have been received by the Superior Court of Pennsylvania on the denial of the petition for return of property, but no decision has of yet been rendered.

REASONS FOR GRANTING THE WRIT

Petitioners herein sought redress for alleged violations of petitioners' constitutional rights under the broad heading of the Civil Rights Act, Title 42, U.S.C. §§1983, 1985 and 1986. Since the Civil Rights Act prescribes no statutory period within which claims must be brought, the limitations period to be applied is one which would be appropriate under the law of the state in

which the federal court is sitting. *Polite v. Diehl*, 507 F.2d 119 (Third Cir. 1975); *Hennig v. Odorioso*, 385 F.2d 491 (Third Cir. 1967), *cert. denied*, 390 U.S. 1016 (1968).

Affirming the memorandum order of Judge Higginbotham and its affirmance by Court of Appeals Judge Van Dusen, seriously constricts the applicable limitation period in which an aggrieved litigant can pursue alleged violations of his constitutional rights.

As in this case where multiple violations are alleged, namely, an illegal search and seizure, a wrongful or fraudulent conversion, intentional acts of defamation, an ongoing conspiracy and coverup, as well as malicious prosecution, restricting petitioners to a two year statute of limitations on general trespass from the date the Municipal Court of Philadelphia (original court of criminal jurisdiction in Philadelphia County, but with automatic right of review to the Court of Common Pleas) suppressed physical evidence illegally seized, unjustly denies petitioners' redress when other constitutional rights of petitioners were flagrantly ignored and disregarded which have a longer statute of limitations.

Judge Higginbotham relied exclusively on Pennsylvania's two year statute of limitations applicable to a general trespass, 12 Purdon's Statutes, Section 31, from the date the Municipal Court of Philadelphia County suppressed the evidence. Taking this rationale, the two year period of statute of limitations expired on October 26, 1974. Since the complaint herein was filed on November 4, 1974, Judge Higginbotham reasons that the suit is barred by the statute of limitations.

In Philadelphia County, the Commonwealth automatically has a right of review, de novo, to the Court of Common Pleas (the court of general jurisdiction) when the Municipal Court suppresses any evidence in a criminal case. Review was sought in petitioner's case, and the actual suppression of physical evidence was finally affirmed and became the final order of the court by order of Judge Doty on November 8, 1973. No appellate review was sought by the Commonwealth.

The order of Judge Doty on November 8, 1973 was the final significant event necessary to make any civil rights claim of petitioner sueable. *Mack Trucks, Inc. v. Bendix-Westinghouse Automotive Air Brake Company*, 372 F.2d 18, cert. denied, 87 S. Ct. 2053 (1966).

Under Pennsylvania law, a statute of limitations begins to run as of the date of injury, unless an exercise of reasonable diligence, could not have ascertained defendant's culpability within a statutory period, in which case, the statute begins to run as of the date of culpability could reasonably have been discovered. *Carney v. Barnett*, 278 F. Supp. 572 (1967). The state of limitations does not begin to run until the right of action is complete. 12 Purdons Statutes, Section 31 and *Moffat v. Metropolitan Casualty Insurance Company of New York*, 238 F. Supp. 165 (1964).

Petitioner urges, if the statutory period of time is to be based on the illegal search and seizure, or general trespass statute of Pennsylvania, that the final significant event making the claim herein sueable was the order of Judge Doty on November 8, 1973, and therefore, the filing of the complaint herein on November 4, 1974 is well within the statutory period.

Petitioners further believe that since in their complaint they alleged a wrongful or fraudulent conversion of their personal property in paragraphs 42, 46, 48, 49, 50, 51, 52, 60 and 64 of the original complaint, and since additional verifying evidence has been recently received by petitioners confirming their allegations that the court should have applied the six year statute of limitations for wrongful conversion of personal property, 12 Purdons Statutes, Section 31, from the date when petitioner, George Fassnacht, was first provided with a property receipt of the items illegally taken from his home on June 20, 1971. Since the property receipt was first provided on July 18, 1974, petitioner urges that the six year statute of limitations would apply and that by petitioner's filing his suit under the Civil Rights Act approximately 3½ months after he was provided with said property receipt which first gave him knowledge that his personal property was missing or stolen, his action falls well within the applicable statute of limitations.

Petitioners further urge this Court to consider that an ongoing coverup and conspiracy continues since the Commonwealth of Pennsylvania refuses to turn over petitioner's property because it is aware that items have been stolen as well as destroyed due to the negligence and wanton and malicious disregard for petitioner's property. In addition, this conspiracy includes agents of the Bureau of Alcohol, Tobacco and Firearms, who were named as defendants in the original complaint. Petitioners have been supplied in September of 1976 with documentation under the Freedom of Information Act, 5 U.S.C. Section 552, with a certain "Investigation Progress Report" from the Bureau of Alcohol, Tobacco and Firearms, covering a period of July 13, 1971 to July 20, 1971 on its

investigation of George Fassnacht, petitioner herein, in its report number 71-151 (TII-31), coded sensitive, wherein it states as follows:

"On July 17, 1971, (name blocked out) telephoned special investigator, (name blocked out) and said that he had an old friend who had been offered some rifles and shotguns from (Fassnacht name blocked out) collection by an insurance agent in the area."

Therefore, petitioners urge this Court to consider the fact that certain named defendants who are agents of the Bureau of Alcohol, Tobacco and Firearms knew within one month after the illegal search and seizure of petitioner's property that said property was up for sale on the black market and therefore, it was not in the custodial protection of the Philadelphia Police Department and the United States Army. The defendants have continuously refused to return the confiscated property of petitioner since they knew that the property could not be returned in total since numerous items were missing and conspired to cover up this information from the date of the break-in until September 1976, when petitioners herein were provided for the first time with this information.

Since petitioners have properly alleged an ongoing conspiracy in paragraphs 61, 62, 63, 66, 67 of the original complaint, and since conspiracy has a six year statute of limitations under Pennsylvania law, petitioners have filed their complaint seeking redress for alleged violations of the Civil Rights Act well within the statutory period.

Petitioner is now aware that 19 specific items are no longer in the possession of the Philadelphia Police Department or the United States Army and that said items were improperly and illegally seized from his home on June 20, 1971. Subsequent investigation has disclosed that at least one handgun stolen from petitioner's residence has been registered by an employee of the federal government on a permit to carry firearms. Since such a blatant disregard for petitioner's civil rights and liberties have been perpetrated by certain members of the Philadelphia Police Force and/or the United States Government, to deny petitioners' redress on a strictly and severely limited interpretation of the statute of limitations does injustice to the intent and spirit of the Civil Rights Act.

To date, petitioners have been denied the opportunity to begin proving their case against the named defendants since no oral testimony has yet been taken. It must be remembered that the defendants herein have been in control of the records and information during the course of events resulting from this illegal search and seizure on June 20, 1971 and have been continuously denying the release of said information to petitioners due to their specific knowledge of the fact that the personal property of the petitioners has been wrongfully converted and negligently misused and destroyed.

That based on other recently received information based on the Freedom of Information Act, *supra*, petitioners have been provided with various investigation reports which indicate that while petitioner was out of the territorial United States for an extended period of time, the United States Central Intelligence Agency (CIA) advised the Bureau of Alcohol, Tobacco and

Firearms, United States Treasury Department, that petitioner would never return to the United States. Federal agents, Milton Ginn and Frank Moyer, both defendants herein, as agents of the BATF, were in possession of this information and went to petitioners' residence on June 20, 1971 and advised the Philadelphia Police, already there, that petitioner would never return to the United States. It is therefore alleged that the BATF agents, United States Army personnel and Philadelphia Police thus felt secure in looting and pillaging petitioner's firearms collection and other personal property and to allow this flagrant violation of petitioners' constitutional rights would be a further injustice.

From 1967 until 1969, petitioner, George Fassnacht, was the supervisor of the ballistics unit of the Philadelphia Police Crime Lab and completely in charge of all ballistics testing in the County of Philadelphia. When petitioner left that job in 1969 to become a member of the Central Intelligence Agency (CIA), his position with the Philadelphia Crime Lab was abolished since there was not an individual technically qualified to fill said position. Petitioner, George Fassnacht, has been continually described by top administrative officers of the District Attorney's Office of Philadelphia County as a true expert in his field. Since the date of the illegal breaking and entering into petitioners' home and seizure of petitioners' property, the petitioner has attempted to earn a living by using his area of specific knowledge to aid defendants as an expert witness in criminal cases around the country.

The defendants herein, through their continual denial of the return of petitioners' personal property, which comprised

his reference library of weapons, personal records, technical books, and objects not related to weaponry in any nature whatsoever, have conspired to neutralize petitioner, George Fassnacht, as an independent forensic ballisticsian and thereby invidiously discriminated against petitioner as a member of an occupational group. Defendants wish to suppress the operation of a small minority of independent forensic ballisticsians since it conflicts with the expert testimony of the official crime laboratories and the laboratories of the Federal Bureau of Investigation.

Since a complete review of the activities of the defendants on the original complaint will clearly indicate an ongoing conspiracy and coverup which has resulted in an occupational discrimination against petitioner and other members of this small minority group and therefore a justiciable claim has been stated under 42 U.S.C. §1986.

In addition, petitioners urge this Court to consider the totality of facts herein and the playup given to this case by the press wherein insinuations were made that petitioner was in fact a member of a radical group supplying arms for revolutionary purposes. As part of this rationale, defendant, Morton Solomon, Deputy Commissioner of the Philadelphia Police Force, and a named defendant, who had complete control at the scene of the illegal search and seizure on June 20, 1971, and Milton Ginn, a federal agent of the Bureau of Alcohol, Tobacco and Firearms, have for long periods prior to the original illegal break-in felt personal animosity towards petitioner and considered him to be a member of a minority radical or racial group being anti-Semitic in nature. Based on these totally

misconceived notions, defendants Solomon and Ginn have unjustifiably classified petitioner, George Fassnacht, a person of German descent, as a "Nazi," though petitioner's complete background has been totally analyzed and digested by the Central Intelligence Agency prior to his being employed by said agency. defendants Solomon and Ginn have acted independently and in concert over a period of years in attempting to discredit petitioner and deny him the right to make a living based on his area of expertise.

Petitioner has been invidiously discriminated against as a member of a small minority of independent forensic ballisticians and further, based on improperly misconceived prejudices against petitioner by the named defendants has been further discriminated against as a member of a small racial group, namely, German descendents, and that based on these discriminations, a justiciable claim has been set forth under 42 U.S.C. §1986 and therefore, the order of Judge Van Dusen relative to said arguments should be reversed.

Petitioner urges as a further avenue for relief that this Court consider the applicable one year statute of limitations for malicious prosecution of petitioner and since he was in fact acquitted of all criminal charges in December of 1973, that his suit filed November 4, 1974 falls within the applicable statute of limitations, 12 Purdons Statutes, Section 31, and to deny petitioner his day in court can only result from a closing of one's eyes as to the numerous civil liberty violations that occurred herein.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and order of the Court of Appeals for the Third Circuit.

Respectfully submitted,

s/ Arthur J. King
Attorney for Petitioners

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APPENDIX

**MEMORANDUM ORDER DATED JUNE 6, 1975
DISMISSING COMPLAINT AS TO WILLIAM STEVENS**

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GEORGE FASSNACHT

and

JANET FASSNACHT

VS

ARLEN SPECTER, ET AL.

CIVIL ACTION

NO. 74-2858

Plaintiffs George Fassnacht and Janet Fassnacht, his wife, seek damages under the Civil Rights Act, 42 U.S.C. §§1983, 1985 and 1986. Their complaint charges twenty-one named defendants and other unnamed individuals with a violation of plaintiffs' constitutional rights by what plaintiffs contend was an unauthorized search and seizure.

The alleged wrong occurred on June 20, 1971, when

*Memorandum Order Dated June 6, 1975 Dismissing Complaint
As To William Stevens*

plaintiffs' home was searched by officers of the Philadelphia Police Department. At the time of the search, George Fassnacht was not in the country. Immediately upon his return to the United States, however, he was arrested and charged with illegal possession in his home of an arsenal of explosives and dangerous weapons. At a hearing prior to trial, on October 4, 1971, his motion to suppress evidence obtained during the search was granted. On or about November 8, 1973, a state appellate court affirmed the suppression. In December, 1973, Mr. Fassnacht was acquitted of all the criminal charges lodged against him.

The instant matter involves a motion by defendant William Stevens to dismiss plaintiffs' complaint under Fed. R. Civ. P. 12(b). Plaintiffs claim that Stevens, an Assistant District Attorney of Philadelphia County, violated their civil rights by illegally entering their home and advising the police who were searching the premises that they could seize any contraband they discovered. Defendant Stevens argues, *inter alia*, that plaintiffs' claim should be dismissed because it is barred by the applicable statute of limitations.

Since the Civil Rights Act prescribes no statutory period within which claims must be brought, the limitations period to be applied is that one which would be appropriate under the law of the state in which the federal court is sitting. *Polite v. Diehl*, 507 F.2d 119 (3d Cir. 1975); *Henig v. Odorioso*, 385 F.2d 491 (3d Cir. 1967), *cert. denied*, 390 U.S. 1016 (1968). This action is

*Memorandum Order Dated June 6, 1975 Dismissing Complaint
As To William Stevens*

governed by Pennsylvania's two year statute of limitations, applicable to a general trespass, 12 P.S. §31.

The statute of limitations generally begins to run as of the date when plaintiffs' injury could reasonably have been discovered. *Carney v. Barnett*, 278 F. Supp. 572 (E.D. Pa. 1967); cf. *Smith v. Bell Tel. Co.*, 397 Pa. 134 (1959). It was within the competence of these plaintiffs to have assessed the cause of the harm on the date of the alleged illegal search, June 29, 1971. That this defendant allegedly entered the plaintiffs' home without a search warrant, and without the presence of exigent circumstances was sufficient to give the plaintiffs notice that the intrusion was unauthorized. Even if the plaintiffs had not discovered their injury on the date of the search, surely on October 4, 1971, the date the evidence was suppressed, they had adequate knowledge to establish an invasion of their privacy.

While the plaintiffs posit authorities which toll the statute "when the right of action is complete," *Moffat v. Metropolitan Casualty Insurance Company of New York*, 238 F. Supp. 165 (M.D. Pa. 1964), or "when the final event necessary to make the claim suable occurs," *Mack Trucks, Inc. v. Bendix Westinghouse Automotive Air Brake*, 372 F.2d 18 (3d Cir. 1966), *cert. denied*, 387 U.S. 930 (1967), those cases are inapposite. They concern indemnification. The statute of limitations analysis there necessarily differs from that which must be employed in this case, since a prior judgment is always necessary in order to determine how liability is to be apportioned when an indemnity issue is decided.

*Memorandum Order Dated June 6, 1975 Dismissing Complaint
As To William Stevens*

In addition to the indemnification cases, the plaintiffs cited an industrial accident case, *Carney v. Barnett, supra*, which makes it difficult to comprehend their legal theory. If it is plaintiffs' argument that a final judgment of acquittal is a prerequisite to the right to bring this type of action, that argument is without merit. Plaintiffs seem to confuse this action with an action of malicious prosecution where a prior judgment of acquittal is an essential element of the tort. See 23 P.L.E., Malicious Prosecution §5.

The discovery of the cause of harm could reasonably have been ascertained either on the date of the search, June 20, 1971, or at the latest, on the date evidence of the search was suppressed, October 4, 1971. I need not decide whether the cause of action accrued on June 20, 1971, or on October 4, 1971. In either event, when this suit was filed on November 4, 1974, plaintiffs' cause of action was barred by the applicable statute of limitations.

The motion to dismiss plaintiffs' complaint as to defendant Stevens under Rule 12(b) of the Federal Rules of Civil Procedure is granted.

s/ A. Leon Higginbotham

*Memorandum Order Dated June 6, 1975 Dismissing Complaint
As To William Stevens*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GEORGE FASSNACHT

and

JANET FASSNACHT

VS

ARLEN SPECTER, ET AL.

CIVIL ACTION

NO. 74-2858

AND NOW, this day of June, 1975, it appearing that plaintiffs' claim against defendant William Stevens is barred by the applicable statute of limitations, 12 P.S. §31, it is hereby ORDERED and DECREED that the Motion of defendant William Stevens to Dismiss the Complaint against him pursuant to Fed. R. Civ. P. 12(b) is GRANTED.

BY THE COURT:

A. Leon Higginbotham

**STIPULATION FOR DISMISSAL OF BERST, HANLIN
AND CHALUPA AS PARTIES-DEFENDANTS (FILED
JULY 3, 1975)**

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

GEORGE FASSNACHT

and

JANET FASSNACHT, his wife

Plaintiffs,

v.

ARLEN SPECTER, et al.

Defendants

CIVIL ACTION

NO. 74-2858

AND NOW, this day of June, 1975, it is hereby stipulated and agreed by and between the undersigned, Arthur J. King, Esquire, attorney for the plaintiffs, and Robert E.J. Curran, United States Attorney in and for the Eastern District of Pennsylvania, and Jeffrey H. Simcox, Assistant United States Attorney in and for the said District, that the complaint against

*Stipulation for Dismissal of Berst, Hanlin and Chalupa as
Parties-Defendants (Filed July 3, 1975)*

defendants Dennis A. Chalupa, Bryan Berst and Joseph R. Hanlin be dismissed without prejudice in this action.

s/ Arthur J. King
ARTHUR J. KING, ESQUIRE
Attorney for Plaintiffs

ROBERT E.J. CURRAN
United States Attorney

JEFFREY H. SIMCOX
Assistant United States Attorney
Attorneys for above-named
defendants

**LETTER DATED JUNE 18, 1975 TO JUDGE
HIGGINBOTHAM REQUESTING RECONSIDERATION**

June 18, 1975

Honorable A. Leon Higginbotham, Jr.
5000 U.S. Court House
Philadelphia, PA 19107

RE: FASSNACHT, et ux vs. SPECTER, et al. Civil
No. 74-2858

Dear Judge Higginbotham:

I am in receipt of a copy of your memorandum order based on the Petition to Dismiss of defendant, William Stevens, Esquire, in the above matter.

Though my clients have asked that we take an immediate appeal to the Circuit Court of Appeals on this order, I feel compelled to ask the Court to reconsider the order based on the fact that a critical date cited in your order is in fact in error.

I direct the Court's attention to Page 2 of said order approximately three quarters of the way down the page wherein the Court states:

"Even if the plaintiffs had not discovered their injury on the date of the search, surely on October 4, 1971, the date the evidence was suppressed, they had adequate knowledge to establish an invasion of their privacy."

*Letter Dated June 18, 1975 to Judge Higginbotham Requesting
Reconsideration*

The Court should be advised that October 4, 1971 was the last date of the taking of oral testimony in the trial in the Municipal Court of Philadelphia before the Honorable Judge Murphy. At that time, Judge Murphy reserved his decision on the testimony of approximately seven days of hearing and stated he wanted the Notes of Testimony transcribed and then additional time granted for the attorneys to prepare legal briefs. Judge Murphy's order suppressing the evidence was filed on October 27, 1972, more than one year after the last date of the taking of testimony. From this order, the Commonwealth immediately appealed to the Common Pleas Court and it was not until November 8, 1973 by an opinion filed by Judge Doty of the Common Pleas Court that the suppression was in fact affirmed, and the evidence actually suppressed from the trial which proceeded one month later in December of 1973, at which the plaintiff was acquitted of all criminal charges.

It has always been plaintiffs' contention that the Statute of Limitations on his civil rights suit herein ran from the date of the decision of Judge Doty and the Common Pleas Court affirming the suppression of the evidence.

In addition to the trespass statute of limitations which the Court relied upon, one should also consider the Wrongful Conversion Statute of Limitations of two years here in Pennsylvania. Mr. Fassnacht was not provided with a property list of the items actually seized on June 20, 1971 until the commencement of his trial in the Common Pleas Court in December of 1973. It was therefore impossible for the plaintiff

10a

*Letter Dated June 18, 1975 to Judge Higginbotham Requesting
Reconsideration*

herein to determine that in fact goods had been wrongfully converted since this inventory in fact failed to list certain enumerated items that were in fact taken. In addition, the Commonwealth has continually refused to provide the plaintiff herein with an inventory of those goods taken. It is therefore plaintiff's position that the statute of limitations would also be extended for two years from the date that he was provided with a property receipt from which he could ascertain if a wrongful conversion had in fact taken place. Since it is that time which was the final event necessary to make the claim sueable or to make the right of action complete, the statute of limitations would run from that date and the filing of our suit on November 4, 1974 was within the two-year period.

Based on the above, we ask your Honor to reconsider your memorandum order since it is our feeling that a critical date was erroneously relied upon.

Very truly yours,

ARTHUR J. KING

AJK/mjh

cc: Bonnie Brigance Leadbetter, Esquire
Jeffrey H. Simcox, Esquire, Ass't U.S. Attorney

11a

**ORDER DATED JULY 3, 1975 DENYING INFORMAL
MOTION TO RECONSIDER**

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CIVIL ACTION NO. 74-2858

GEORGE FASSNACHT

-and-

JANET FASSNACHT

VS.

ARLEN SPECTER, ET AL.

Counsel for plaintiffs in his letter of June 18, 1975, Document No. 16, has asked the Court "to reconsider the order based on the fact that a critical date cited in your order is in fact in error."

Even though that date appears to be in error, the statute of limitations would still start to run as of October 27, 1972, the date of filing of Judge Murphy's order suppressing the evidence.

12a

Order Dated July 3, 1975 Denying Informal Motion to Reconsider

The motion to dismiss would still be appropriate. The informal motion to reconsider is DENIED.

BY THE COURT:

s/ A. Leon Higginbotham

DATED: July 3, 1975.

ORDER DATED SEPTEMBER 16, 1975 DISMISSING COMPLAINT AS TO DEFENDANTS GINN AND MOYER AND ENTERING SUMMARY JUDGMENT IN FAVOR OF UNITED STATES OF AMERICA

In the United States District Court

For The Eastern District of Pennsylvania

CIVIL ACTION NO. 74-2858

GEORGE FASSNACHT

AND

JANET FASSNACHT, his wife

Plaintiffs

v.

ARLEN SPECTER, et. al.

Defendants

13a

Order Dated September 16, 1975 Dismissing Complaint as to Defendants Ginn and Moyer and Entering Summary Judgment in Favor of United States of America

And Now, this 16th day of September, 1975, upon consideration of the Government's Motion to Dismiss or in the Alternative for Summary Judgment and Memorandum in Support thereof, it is hereby

ORDERED, ADJUDGED AND DECREED that the Complaint in this matter be dismissed as to defendants Milton Gunn, and Frank A. Moyer and summary judgment be entered in favor of the United States of America and against the plaintiff.

BY THE COURT:

s/ A. Leon Higginbotham

14a

**ORDER DATED SEPTEMBER 17, 1975 ENTERING
JUDGMENT IN FAVOR OF UNITED STATES OF
AMERICA**

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CIVIL ACTION NO. 74-2858

**GEORGE FASSNACHT and
JANET FASSNACHT, his wife**

vs.

ARLEN SPECTER, et al

BEFORE HIGGINBOTHAM, J.

AND NOW, this 17th day of Sept., 1975, it is

**ORDERED that in accordance with Order dated
September 16, 1975, Judgment is entered in favor of the United
States of America and against the plaintiffs.**

ATTEST: OR BY THE COURT:

BY: _____

Deputy Clerk

Civ. 12-3/74

**_____
Judge**

15a

**ORDER DATED OCTOBER 16, 1975 DISMISSING
COMPLAINT AS TO ALL DEFENDANTS WITH
PREJUDICE**

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CIVIL ACTION NO. 74-2858

GEORGE FASSNACHT

and

JANET FASSNACHT, his wife

Plaintiffs,

v.

ARLEN SPECTER, et al.,

Defendants

**1. On September 16, 1975, Document No. 24, I entered an
order dismissing plaintiff's complaint as to defendants Milton
Gunn and Frank A. Moyer. This order was issued without any
rationale for that dismissal. The rationale for that dismissal is
noted in the attached memorandum.**

*Order Dated October 16, 1975 Dismissing Complaint as to All
Defendants With Prejudice*

2. The order of September 16, 1975, Document No. 24, which refers to the defendant Milton Gunn is modified to refer to said defendant as Milton Ginn.

3. The parties have submitted a stipulation as to defendants Dennis A. Chalupa, Bryan Berst and Joseph R. Hanlin for a dismissal of the complaint without prejudice; in view of my findings as noted in the attached memorandum the complaint is dismissed as to all defendants with prejudice.

BY THE COURT:

s/ A. Leon Higginbotham

**MEMORANDUM ORDER DATED OCTOBER 16, 1975
SUPPORTING DISMISSAL**

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CIVIL ACTION NO. 74-2858

GEORGE FASSNACHT

and

JANET FASSNACHIT, his wife

Plaintiffs

v.

ARLEN SPECTER, et al.,

Defendants

Pursuant to 42 U.S.C. §§1983, 1985 and 1986, plaintiffs George Fassnacht and Janet Fassnacht, his wife, filed this action charging twenty-one named defendants and other unnamed individuals with a violation of plaintiffs' constitutional rights by an alleged unauthorized search of and seizure from the plaintiffs' home.

The event complained of occurred on June 20, 1971, when

Memorandum Order Dated October 16, 1975 Supporting Dismissal

plaintiffs' home was searched by officers of the Philadelphia Police Department. At the time of the search, George Fassnacht was not in the country. Immediately upon his return to the United States, however, he was arrested and charged with illegal possession in his home of an arsenal of explosives and dangerous weapons. At a hearing prior to trial, on October 27, 1972, Mr. Fassnacht's motion to suppress evidence obtained via the search was granted. On or about November 8, 1973, a state appellate court affirmed the suppression. In December, 1973, Mr. Fassnacht was acquitted of all the criminal charges lodged against him.

The matter in question in this opinion is a motion by defendants Milton Ginn and Frank Moyer to dismiss plaintiffs' complaint under Fed. R. Civ. P. 12(b), or in the alternative, for summary judgment under Fed. R. Civ. P. 56. Plaintiffs claim that Ginn, a Group Supervisor, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury [hereafter referred to as AFT] and Moyer, Firearms Specialist, AFT, violated their civil rights by illegally entering their home, removing and damaging the personal property of the plaintiffs. Defendants Ginn and Moyer argue, *inter alia*, that plaintiffs' claim should be dismissed: (1) for lack of subject matter jurisdiction; (2) for failure to state a claim upon which relief can be granted by virtue of the doctrine of official immunity; and by supplement to the above-mentioned motion (3) for failure to state a claim upon which relief can be granted because of the bar of the applicable statute of limitations.

Memorandum Order Dated October 16, 1975 Supporting Dismissal

Without deciding the issues raised by the defendants in parts one and two of their brief in support of their motion for dismissal, even if those objections were resolved in the plaintiffs' favor, the action would be barred by the statute of limitations.

Since the Civil Rights Act prescribes no statutory period within which claims must be brought, the limitations period to be applied is that which would be appropriate under the law of the state in which the federal court is sitting. *Polite v. Diehl*, 507 F. 2d 119 (3d Cir. 1975); *Henig v. Odorioso*, 385 F. 2d 491 (3d Cir. 1967), *cert. denied*, 390 U.S. 1016 (1968); *Fassnacht v. Specter*, Civil No. 74-2858 (E.D. Pa., decided June 6, 1975). This action is governed by Pennsylvania's two year statute of limitations applicable to a general trespass, 12 P.S. §31.

The statute of limitations generally begins to run as of the date when plaintiffs' injury could reasonably have been discovered. *Carney v. Barnett*, 278 F. Supp. 572 (E.D. Pa. 1967); cf. *Smith v. Bell Tel. Co.*, 397 Pa. 134 (1959). Plaintiffs were capable of identifying the harm complained of on the date of the alleged illegal intrusion into their home, June 20, 1971. Even if the plaintiffs had not discovered their injury on the date of the search, surely on October 27, 1972, the date the evidence was suppressed, they had adequate knowledge to establish an invasion of their privacy by Messrs. Ginn and Moyer. *Fassnacht, supra*; Order, *Fassnacht v. Specter*, Civil No. 74-2858 (E.D. Pa., decided July 3, 1975).

*Memorandum Order Dated October 16, 1975 Supporting
Dismissal*

Plaintiffs could reasonably have ascertained their harm either on the date of the search, June 20, 1971, or at the latest, on the date evidence of the search was suppressed, October 27, 1972. I need not decide whether the cause of action accrued on June 20, 1971, or on October 27, 1972. In either event, since this suit was not filed against Messrs. Ginn & Moyer until November 4, 1974, plaintiffs' cause of action is barred by the applicable statute of limitations. In view of my decision in the instant matter, I need not and do not reach the other issues briefed by the defendants in support of their motion to dismiss.

The motion to dismiss plaintiffs' complaint as to defendants Milton Ginn and Frank Moyer under Fed. R. Civ. P. 12(b) is GRANTED.

BY THE COURT:

s/ A. Leon Higginbotham

**ORDER OF AFFIRMANCE OF UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT DATED
OCTOBER 8, 1976**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2394

GEORGE FASSNACHT and JANET FASSNACHT, his wife,

Appellants

v.

ARLEN SPECTER, WILLIAM STEVENS, JOSEPH O'NEILL, ROBERT W. MARTIN, JOHN E. McLAUGHLIN, JOSEPH ZALENSKI, BERNARD LYNCH, MORTON SOLOMON, JOSEPH MORRISSEY, EDWARD RAGIN, HOWARD McGRATH, DENNIS JOINS, WILLIAM BORBRIDGE, RAYMOND GRAHAM, FRANK A. MOYER, MILTON GINN, LARRY PAUL, DENNIS A. CHALUPA, BRYAN BERST, JOSEPH R. HANLIN, GEORGE MAZEL, and other unidentified individuals whose identities and whereabouts are unknown at the present time, all individually, jointly, and severally, and as employees of the City of Philadelphia, the United States Government and the United States Army

(D.C. Civil No. 74-2858)

*Order of Affirmance of United States Court of Appeals for the
Third Circuit Dated October 8, 1976*

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Submitted under 3rd Cir. Rule 12(6) October 6, 1976

Before BIGGS, VAN DUSEN and ROSENN,
Circuit Judges

Arthur J. King, Esq.,
Norristown, Pa.,
Attorney for Appellants

Bonnie Brigance Leadbetter, Esq.,
Assistant District Attorney,
Philadelphia, Pa.,
Attorney for Appellees
Specter & Stevens

J. Clayton Undercofler, III, U.S.
Attorney;
Walter S. Batty, Jr., Assistant
U.S. Attorney, Chief, Appellate
Division;
Jeffrey H. Simcox, Assistant U.S.
Attorney;
Philadelphia, Pa.,
Attorneys for Appellees United
States of America, Ginn and
Moyer

*Order of Affirmance of United States Court of Appeals for the
Third Circuit Dated October 8, 1976*

Howland W. Abramson, Assistant
City Solicitor, Philadelphia, Pa.,
Attorney for Appellees O'Neill,
Martin, McLaughlin, Zalenski,
Lynch, Solomon, Morrissey,
Ragin, McGrath, Joins,
Borbridge, Graham and Paul

After consideration of all contentions raised by appellants,
it is

ADJUDGED AND ORDERED that the judgment of the
district court be and is hereby affirmed.¹

1. See *Fassnacht v. Specter*, Memoranda of June 6, 1975 (62a) and
October 16, 1975 (73a) (E.D. Pa. Civil No. 74-2858).

As to Ginn and Moyer, federal officials acting under color of federal law,
there is no cause of action stated under 42 U.S.C. §1983, 1985 or 1986. See,
e.g., *District of Columbia v. Carter*, 409 U.S. 418 (1972); *Bethea v. Reid*, 445
F.2d 1163 (3d Cir. 1971).

Also, the absence of any claim of "racial, or perhaps otherwise class based,
invidiously discriminatory animus" precludes any cause of action against any
defendant under 42 U.S.C. §1986. See *Griffin v. Breckenridge*, 403 U.S. 82, 102
(1971).

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*Order of Affirmance of United States Court of Appeals for the
Third Circuit Dated October 8, 1976*

Costs taxed against appellants.

BY THE COURT:-

s/ Francis L. Van Dusen
Circuit Judge

Dated: October 8, 1976

Attest:

s/ M. Elizabeth Ferguson
Chief Deputy Clerk

Certified as a true copy and issued in lieu of a formal mandate
on December 7, 1976.

Test: s M. Elizabeth Ferguson

Chief Deputy Clerk, U.S. Court of Appeals for the Third
Circuit.

25a

**DENIAL OF PETITION FOR REHEARING DATED
NOVEMBER 29, 1976**

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 75-2394

GEORGE FASSNACHT and JANET FASSNACHT, his wife,

Appellants

v.

ARLEN SPECTER, WILLIAM STEVENS, JOSEPH
O'NEILL, ROBERT W. MARTIN, JOHN E. McLAUGHLIN,
JOSEPH ZALENSKI, BERNARD LYNCH, MORTON
SOLOMON, JOSEPH MORRISSEY, EDWARD RAGIN,
HOWARD McGRATH, DENNIS JOINS, WILLIAM
BORBRIDGE, RAYMOND GRAHAM, FRANK A. MOYER,
MILTON GINN, LARRY PAUL, DENNIS A. CHALUPA,
BRYAN BERST, JOSEPH R. HANLIN, GEORGE MAZEL,
and other unidentified individuals whose identities and
whereabouts are unknown at the present time, all individually,
jointly and severally, and as employees of the City of
Philadelphia, the United States Government and the United
States Army

Denial of Petition for Rehearing Dated November 29, 1976

**Present: SEITZ, Chief Judge, and BIGGS, VAN DUSEN,
ALDISERT, ADAMS, GIBBONS, ROSENN,
HUNTER, WEIS and GARTH, Circuit Judges.**

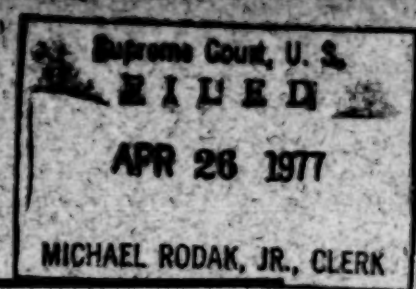
The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

**s/ Van Dusen
Judge**

Dated: November 29, 1976

No. 76-1190



In the Supreme Court of the United States

OCTOBER TERM, 1976

GEORGE FASSNACHT, ET AL., PETITIONERS

v.

ARLEN SPECTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS
IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1190

GEORGE FASSNACHT, ET AL., PETITIONERS

v.

ARLEN SPECTER, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

**MEMORANDUM FOR THE FEDERAL RESPONDENTS
IN OPPOSITION**

Petitioners instituted this civil rights suit against both local and federal defendants, charging violations of 42 U.S.C. 1983, 1985, and 1986, in connection with a search of and seizure from petitioners' home.

The search occurred on June 20, 1971.¹ Subsequent to the search, petitioner George Fassnacht was arrested and charged with illegal possession of an arsenal of dangerous weapons and explosives. On October 27, 1972, his pretrial motion to suppress evidence was granted, and the state appellate court affirmed on November 8, 1973. In December 1973, he was acquitted of all criminal

¹The facts are set forth in greater detail in the memorandum orders of the district court (Pet. App. 1a-4a, 11a-12a, 17a-20a).

charges. Petitioners filed this civil action on November 4, 1974, more than three years after the search.

The district court dismissed the complaint with respect to all defendants, holding that the claims were barred by Pennsylvania's two-year statute of limitations applicable to a general trespass (Pet. App. 5a, 13a, 16a).² The court of appeals affirmed (Pet. App. 21a-23a), noting in addition that petitioners had stated no cause of action under the Civil Rights Acts with respect to the federal defendants (Pet. App. 23a).

1. The district court properly dismissed the complaint as to the federal defendants. 42 U.S.C. 1983 only states a cause of action against persons acting under the color of state law. The federal defendants here derived their authority from federal law and accordingly are not liable under Section 1983. *District of Columbia v. Carter*, 409 U.S. 418; *Soldevila v. Secretary of Agriculture*, 512 F. 2d 427, 429 (C.A. 1); *Roots v. Callahan*, 475 F. 2d 751 (C.A. 5). Similarly the federal defendants could not be held liable under 42 U.S.C. 1985. As the court of appeals correctly determined (Pet. App. 23a), petitioners' complaint does not allege facts sufficient to establish a case of invidious class-based discrimination under that statute. See *Griffin v. Breckenridge*, 403 U.S. 88, 102; *Denman v. Leedy*, 479 F. 2d 1097 (C.A. 6). Finally, there can be no federal liability under 42 U.S.C. 1986, for a violation of Section 1985 is a prerequisite to a cause of action under 42 U.S.C. 1986. See *Hamilton v. Chaffin*, 506 F. 2d 904, 914 (C.A. 5); *Dowsey v. Wilkins*, 467 F. 2d 1022, 1026 (C.A. 5); *Hahn v. Sargent*, 388 F. Supp. 445, 450 (D. Mass.), affirmed 523 F. 2d 461, 469-470 (C.A. 1), certiorari denied, 425 U.S. 904; *Johnston v.*

²Federal defendants Berst, Hanlin and Chalupa were dismissed pursuant to a stipulation between the parties (Pet. App. 6a-7a, 16a).

National Broadcasting Co., Inc., 356 F. Supp. 904, 909-910 (E.D. N.Y.).

2. The applicable statute of limitations had run before suit was filed. 42 U.S.C. 1986 contains a one-year statute of limitations. The state statute of limitations for the most similar cause of action is applicable to actions under 42 U.S.C. 1983 and 1985. *O'Sullivan v. Felix*, 233 U.S. 318; *Kaiser v. Cahn*, 510 F. 2d 282, 284-285 (C.A. 2); *Ammlung v. City of Chester*, 494 F. 2d 811, 814 (C.A. 3). The district court reasonably concluded that Pennsylvania's two-year general trespass statute of limitations applied to the most closely analogous state cause of action (Pet. App. 19a).³

The district court did not err in holding that petitioners' action was barred under these limitation statutes (Pet. App. 2a-3a, 19a). The court held that the limitation period began running at the time the state trial court first ordered the seized evidence suppressed (Pet. App. 19a). At least from that date, if not from the date of the actual search, petitioners' cause of action for alleged constitutional violations had accrued. Affirmance of the suppression order was not a prerequisite "to make any civil rights claim of petitioner sueable" (Pet. 8), and there was no basis for suspending the running of the statute past the entry of the suppression order (Pet. App. 3a). See, e.g., *Kaiser v. Cahn*, 510 F. 2d 282, 285 n. 3 (C.A. 2); *Strung v. Anderson*, 452 F. 2d 632 (C.A. 9). The institution of the present suit on

³The district court correctly held that the statute of limitations for the trespass action barred petitioners' claims, all of which related to the allegedly improper search and seizure. See *Ammlung v. City of Chester*, 494 F. 2d 811, 814 (C.A. 3); *Smith v. Cremins*, 308 F. 2d 187, 190 (C.A. 9); *McIver v. Russell*, 264 F. Supp. 22, 27 (D. Md.). In any event, the question whether the district court correctly characterized petitioners' claims for the purpose of applying the appropriate state statute of limitations does not warrant review by this Court. See generally *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706.

November 4, 1974, more than two years after the first suppression order, and three years after the seizure, was barred by the applicable statutes of limitations.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1977.